89- 1536

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

G. WAYNE HALL, INDIVIDUALLY AND AS NEXT FRIEND OF APRIL LYNN HALL, MINOR; RONALD WYATT, INDIVIDUALLY AND AS NEXT FRIEND OF NICHOLE WYATT, MINOR; MARTIN URAND; and KATY INDEPENDENT SCHOOL DISTRICT,

Petitioners,

v.

CNA INSURANCE COMPANIES and CONTINENTAL CASUALTY CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON

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Attorneys for Petitioners

March 20, 1990

QUESTIONS PRESENTED FOR REVIEW

1. In a civil rights case, is there a separate cause of action for compensatory damages for mental anguish resulting from a deprivation of substantive constitutional rights, independent of the cause of action for mental anguish resulting from physical injury which flows from the deprivation of rights and for which there is no available state remedy?

2. In a civil rights case, may separate compensatory damages be awarded for mental anguish arising from the deprivation of constitutionally protected rights which deprivation immediately results in physical injury for which damages for the physical injury there is no available state remedy?

3. In a case where there is evidence of a physical injury flowing from the acts constituting a deprivation of constitutional rights, may damages for the deprivation of constitutional rights be awarded separate and independent of damages awarded for physical injuries and not as arising from the physical injuries?

LIST OF PARTIES

The parties to the proceedings in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston are identified in the caption of this petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES i

REPORT OF DECISION 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. There Is Conflict Among The Lower Federal Courts And The State Courts On The Issue Of Whether Compensatory Damages May Be Awarded For Mental Anguish Resulting From The Deprivation Of Substantive Constitutional Rights As Separate From Mental Anguish Caused By Resulting Bodily Injury. 9

II. The Origin Of Damages Recoverable For Deprivation Of Constitutional Rights Presents An Important Federal Question. . . . 13

CONCLUSION 14

APPENDIX A (Judgment and Opinion of Court of Appeals) . . . . . A 1

APPENDIX B (Order of Court of Appeals) . . . . A 9

APPENDIX C (Order of Texas Supreme Court) A 11

APPENDIX D (Order of Texas Supreme Court) A 13

TABLE OF AUTHORITIES

Page

CASES

Barr v. Bernard,
562 S.W.2d 844 (Tex. 1978) 5

Billings v. Atkinson,
489 S.W.2d 858 (Tex. 1973) 14

Carey v. Piphus,
435 U.S. 247 (1978) 9, 10, 12, 13, 14

Continental Cas. Co. v. Hall,
761 S.W.2d 54 (Tex.App.--Houston
[14th Dist.] 1988, *writ denied*) 1

Continental Casualty Co. v.
McAllen Indep. School Dist.,
850 F.2d 1044 (5th Cir. 1988) 9

Continental Casualty Co.
V. City of Richmond,
763 F.2d 1076 (9th Cir. 1985) 10

Cotton States Mutual Ins. Co. v. Crosby, 244 Ga. 456, 260 S.E.2d 860 (1979) 10

Duncan v. Nelson, 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S.894, 93 S.Ct. 116, 34 L.Ed.2d 152 (1972) 13

Foreman v. Continental Casualty Co., 770 F.2d 487 (5th Cir. 1985) 9, 10, 14

Gilmere v. City of Atlanta, Georgia, et al, 864 F.2d 734 (11th Cir. 1989) 11

Ingraham v. Wright, 430 U.S. 651 (1977) 12

Interstate Fire & Casualty Co. v. Stuntman Inc., 861 F.2d 203 (9th Cir. 1988) 11

McKinney v. Greene, 379 So.2d 69 (La.Ct.App. 1979), *writ denied*, 381 So.2d 1233 (La. 1980) 10

Memphis Community School District V. Stachura, 106 S.Ct. 2537 (1986) 9, 11, 13

Moore v. Lillebo, 722 S.W.2d 683 (Tex. 1986) 14

Shillingford v. Holmes,
634 F.2d 263 (5th Cir. 1981) 12

St. Elizabeth Hospital v. Garrard,
730 S.W.2d 649 (Tex. 1987) 12, 14

White v. Rockford, 592 F.2d 381
(7th Cir. 1979) 12, 14

Youngberg v. Romeo,
102 S.Ct. 2452 (1982) 12

AUTHORITIES

28 U.S.C. § 1257(3) 1

42 U.S.C. § 1983 . . . . . passim

Texas Tort Claims Act,
Art. 6252-19, T.R.C.S. 4

REPORT OF DECISION

The Petitioners, G. Wayne Hall, individually and as next friend of April Lynn Hall, minor; Ronald Wyatt, individually and as next friend of Nichole Wyatt, minor; Martin Urand; and Katy Independent School District, respectfully pray that a writ of certiorari issue to review the Decision of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston entered on October 20, 1988 (Appendix A), which is reported as *Continental Cas. Co. v. Hall*, 761 S.W.2d 54 (Tex.App.--Houston [14th Dist.] 1988, *writ denied*).

JURISDICTION

The Judgment and Opinion sought to be reviewed were dated and entered on October 20, 1988 (Appendix A). A Motion for Rehearing was timely filed on November 3, 1988. The Order overruling that Motion was entered on November 23, 1988 (Appendix B). Application for Writ of Error to the Supreme Court of Texas was timely filed on December 22, 1988. The Order denying that Application was entered on November 8, 1989 (Appendix C). A Motion for Rehearing of the Application for Writ of Error was timely filed on November 27, 1989. The Order Overruling that Motion was entered on December 20, 1989 (Appendix D).

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

On February 5, 1981, Petitioners, April Hall and Nichole Wyatt along with 142 of their second grade classmates were engaged in a tug of war at school. They were engaged in compulsory school function, rendering the function one done under color of state law. The rope used in the tug of war had a loop in it. The loop was part of a slip knot. When the children pulled on the rope, the slip knot allowed the loop to close, tearing fingers from the childrens' hands.

On July 19, 1984, Hall and Wyatt filed suit in Federal Court. This suit was one for violations of the Hall's and Wyatt's constitutional rights pursuant to 42 U.S.C. § 1983. Following notice of the suit, CNA informed KISD that its BEL policy, provision IV (b) (3), specifically excluded coverage:

"(b) The Insurer shall Not be liable to make any payment for loss in connection with any c l a i m against the Assureds.

...

(3) for damages, direct or consequential, arising from bodily injury, sickness, or death of any person, or for damage to or destruction of any tangible property including loss or use thereof."

On November 7, 1984, Sedgeley wrote CNA as follows:

I bring to your attention page three (3) alleging grounds for jurisdiction. The theory behind the complaint is that the plaintiffs possessed constitutionally protected property interests that had been violated by the school district, it's administrators or employees. In particular, the plaintiffs claim to have a constitutional protected interest

in the following:

a. The accredition (sic) policies, rules and regulations of the Texas Education Agency, governing the delivery of public education to Plaintiffs by the Katy Independent School District;

b. A tax-supported, compulsory, public education;

c. A public education;

d. Their respective bodily integrities while compulsorily attending public school;

e. A reasonable safe educational environment which will not unnecessarily expose Plaintiffs to unreasonable risks of physical harm; and/or

f. An educational environment which will not by deliberate indifference, subject Plaintiffs to risks of harm.

The complaint further alleges that the school district, it's Board of Trustees, administrators and employees infringed upon or denied the Plaintiffs constitutionally protected rights.

The cause of action is not a suit for personal injury and is not a cause of action based upon acts of negligence of the Defendants which have caused bodily injury to the Plaintiffs.

CNA ignored Sedgeley's letter of November 7, 1984, causing Sedgeley to write again on December 7, 1984. For the second time on December 28, 1984 CNA denied coverage for the cause of action alleged in the federal court suit.

After the second unqualified denial of coverage, Hall's and Wyatt's attorney, Watts, offered to settle the

cases for $1 million, what he believed to be the policy limits. Sedgeley was replaced by Leebron as KISD's and Urand's attorney. Leebron wrote CNA on May 7, 1985 demanding they settle the cases for the $1 million offered. CNA ignored this demand also. Both Sedgeley and Leebron wrote CNA telling them that if CNA continued its refusal to defend and settle, KISD, et al, "will be forced to negotiate directly with Plaintiffs in an attempt to limit the liability of all Defendants." In the face of these warnings, CNA, for the fifth time, either refused or ignored its insureds' demands.

On June 13, 1985 a Notice of Dismissal of the federal court cause was filed. Then the state court suit was filed making allegations identical to those in federal court.

No state cause of action exists as to bodily injury or property damage. Prior to the passage of the Texas Tort Claims Act, Art. 6252-19, T.R.C.S., school districts were absolutely immune from suits for claims "for bodily injuries and property damage" due to the doctrine of sovereign immunity. As of 1971, that Act limited that immunity somewhat.

Sec. 3(b) provides in part:

(b) Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven vehicle and motordriven equipment. ...

Sec. 19A provides:

The provisions of this Act shall not apply to school districts or to junior college districts except as to motor vehicles.

This is the only State cause of action which may be urged against a school district or its employees for bodily injury, death or property damage of any kind. There is no cause of action for damages for bodily injuries or for damages to either tangible or intangible property damage "except as to motor vehicles." *Barr v. Bernard*, 562 S.W.2d 844 (Tex. 1978).

On June 17, 1985, Judge Dickerson rendered Judgment in the state court cause, with Findings of fact and conclusions of law. Those include the following:

11. Due to the negligence of Defendant herein, the minor Plaintiffs were damaged in the following respective amounts:

a) "APRIL HALL":

1) for past and future medical expenses reasonably and necessarily incurred as a result of and proximately caused by Defendant's negligence, together with prejudgment interest, the present and current amount of $65,000.00;

2) for future lost earnings and impairment of earning capacity occasioned as a result of and proximately caused by Defendant's negligence, the present and current amount of $800,000.00;

3) for past and future pain, suffering and mental anguish occasioned as a result of and proximately caused by Defendant's negligence, the present and current amount of $2,000,000.00;

4) for deprivation of the constitutional rights made the basis of this action, occasioned as a result of and proximately caused by Defendant's negligence the present and current amount of $4,500,000.00;

5) each of the foregoing amounts as awarded by the Court are found to be just and reasonable.

a) "NICHOLE WYATT":

1) for past and future medical expenses reasonably and necessarily incurred as a result of and proximately caused by Defendant's negligence, together with prejudgment interest, the present and current amount of $35,000.00;

2) for future lost earnings and impairment of earning capacity occasioned as a result of and proximately caused by Defendant's negligence, the present and current amount of $275,000.00;

3) for past and future pain, suffering and mental anguish occasioned as a result of and proximately caused by Defendant's negligence, the present and current amount of $500,000.00;

4) for deprivation of the constitutional rights made the basis of this action, occasioned as a result of and proximately caused by Defendant's negligence the present and current amount of $2,250,000.00;

5) each of the foregoing amounts as awarded by the Court are found to be just and reasonable.

Once that judgment had become final, suit was filed for bad faith and for collection of judgment alleging bad faith and grossly negligent failure and refusal to defend

and settle on the part of CNA of the claims made by Hall and Wyatt against Urand and Katy Independent School District. After a jury verdict finding numerous acts of bad faith and gross negligence which were the proximate and producing cause of judgment rendered against Petitioner Urand, the trial court rendered judgment against Respondents.

Respondents appealed and raised the issue, *inter alia*, that all damages arose from Petitioners' physical injuries and were excluded under IV (b) (3).

The panel which heard this case consisted of Chief Justice Brown and Justices Murphy, and Robertson. Chief Justice Brown wrote the opinion in which the court held that "in determining the applicability of the exclusion, our focus must be on the origin of the damages, not the legal theory asserted for recovery," that "Hall and Wyatt seek damages arising from the physical injuries to their hands, unquestionably bodily injury, and that "the policy, as a matter of law, excludes [Petitioners'] claims," and that Petitioners Hall and Wyatt, Urand and Katy Independent School District take nothing (Appendix A).

A Motion for Rehearing was timely filed on November 3, 1988. The Order overruling that Motion was entered on November 23, 1988 (Appendix B). Application for Writ of Error to the Supreme Court of Texas was timely filed on December 22, 1988. The Order denying that Application was entered on November 8, 1989 (Appendix C). A Motion for Rehearing of the Application for Writ of Error was timely filed on November 27, 1989. The Order Overruling that Motion was entered on December 20, 1989 (Appendix D).

REASONS FOR GRANTING THE WRIT

I.

There Is Conflict Among The Lower Federal Courts And The State Courts On The Issue Of Whether Compensatory Damages May Be Awarded For Mental Anguish Resulting From The Deprivation Of Substantive Constitutional Rights As Separate From Mental Anguish Caused By Resulting Bodily Injury.

In *Carey v. Piphus*, 435 U.S. 247 (1978), a case involving a denial of procedural due process, the Court held that damages for mental and emotional distress is compensable under 42 U.S.C. § 1983 with proof that such injury was actually caused. In *Memphis Community School District V. Stachura*, 106 S.Ct. 2537 (1986), the Court held that the abstract value of the constitutional right may not form the basis for § 1983 damages and that compensable damages may include such injuries as personal humiliation and mental anguish and suffering. The important question left open in *Carey* and *Stachura* and presented here is whether mental anguish resulting from a deprivation of *substantive* constitutional rights is independent of mental anguish caused by a resulting bodily injury.

In *Continental Casualty Co. v. McAllen Indep. School Dist.*, 850 F.2d 1044 (5th Cir. 1988), and *Foreman v. Continental Casualty Co.*, 770 F.2d 487 (5th Cir. 1985), the Fifth Circuit refused to allow recovery for deprivation of substantive constitutional rights which resulted in bodily injury on the theory that all of the claimed damages arose from the bodily injury, excluded under the policies by IV

(b) (3). As the Court stated in *Foreman*, "The focus is on the origin of the damages, not the legal theory of the claim." 770 F.2d at 489.

The Ninth Circuit adopted the same approach in *Continental Casualty Co. V. City of Richmond*, 763 F.2d 1076 (9th Cir. 1985), as have some State courts. *Cotton States Mutual Ins. Co. v. Crosby*, 244 Ga. 456, 260 S.E.2d 860 (1979) (rape of a student on school premises); *McKinney v. Greene*, 379 So.2d 69 (La.Ct.App. 1979), *writ denied*, 381 So.2d 1233 (La. 1980) (principal allegedly kicked student).

These courts share the common interpretation of *Carey's* "actual injury" requirement as necessarily meaning that all compensation for deprivation of constitutional rights flows from the injury itself and no compensation is allowed for any mental anguish which may arise solely from the deprivation of the right, even when such is provable. This line of reasoning is in direct conflict with the Court's holding in *Carey*:

> [A]lthough mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.

Carey, 435 U.S. at 265.

In contrast to this line of authority, the Eleventh Circuit found separate injuries resulting from wrongful death and deprivation of constitutional rights in *Gilmere*

v. City of Atlanta, Georgia, et al, 864 F.2d 734 (11th Cir. 1989). Citing *Stachura*, the Eleventh Circuit states, "[f]ederal law provides for compensation for injuries caused by a constitutional deprivation ... and allows the imposition of punitive damages even in cases where such recovery may not be made under state law." 864 F.2d at 739. *Gilmere* also observes that "[c]ompensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress..." *Id.* The Eleventh Circuit also states, "[t]he focus of any award of damages under § 1983 is to compensate for the actual injuries caused by the constitutional deprivation." *Id.* Further the opinion recites that:

> [t]he Supreme Court has stated that § 1983 remedies are "supplementary to any remedy any State might have," and "have no precise counterpart in State law."...[t]hus, there is no requirement that a state remedy be employed to compensate for a violation of a federal interest.

Id.

Gilmere recognizes "actual injuries caused by the deprivation of a constitutional right." 864 F.2d at 740. So, while there was an injury in *Gilmere* resulting from a wrongful death, there was also an injury from deprivation of constitutional rights.

Although not in the context of a constitutional violation, the Ninth Circuit (applying California law) has specifically held that, "[e]motional or mental injuries are not inextricably linked to bodily injury..." *Interstate Fire & Casualty Co. v. Stuntman Inc.*, 861 F.2d 203, 204 (9th Cir. 1988). Similarly, the Texas Supreme Court has held, "that

proof of physical injury is no longer required in order to recover for negligent infliction of mental anguish..." *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649, 650 (Tex. 1987).

Assuming, *arguendo*, that the children in this case had managed to safely extricate their hands from the instantly tightened slipknot, they would have undoubtedly suffered mental distress from their realization of narrowly escaping severe physical injury. Upon proof of such mental distress, the "actual injury" requirement of *Carey* would be satisfied and compensatory damages would be recoverable.

Courts have repeatedly recognized that the right to personal security "constitutes an 'historic liberty interest' protected substantively by the due process clause." *Youngberg v. Romeo*, 102 S.Ct. 2452, 2458 (1982), citing *Ingraham v. Wright*, 430 U.S. 651 (1977). *See Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). This right to personal security does not necessarily implicate bodily injury, as the Seventh Circuit stated:

> The right to personal security can hardly consist only of freedom from direct bodily harm and exclude what will often be more important, freedom from unnecessary and unjustifiable exposure to physical danger or to injury to health.

White v. Rockford, 592 F.2d 381, 387 (7th Cir. 1979) (Tone, Circuit Judge, concurring).

And:

> Although physical violence would ordinarily make damages greater and more easily ascertainable, we see no reason in either logic or experience to require... physical violence as a necessary prerequisite to suit under § 1983.

Duncan v. Nelson, 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S.894, 93 S.Ct. 116, 34 L.Ed.2d 152 (1972).

II.

The Origin Of Damages Recoverable For Deprivation Of Constitutional Rights Presents An Important Federal Question.

As the Court stated in *Carey* and reiterated in *Stachura*, ""the basic purpose" of § 1983 damages is "to compensate persons for injuries that are caused by the deprivation of constitutional rights." *Carey*, 435 U.S., at 254, 98 S.Ct., at 1047. Although the Court has instructed the district courts to adapt the common-law rules of damages, it has further stated that, "[i]n [some] cases, it may be appropriate to apply the tort rules of damages directly to the § 1983 action." *Id.*, 435 U.S., at 259, 98 S.Ct., at 1049. *Carey*, closes the discussion of the damage principles by stating:

> In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question--just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.

Carey, 435 U.S., at 260, 98 S.Ct., at 1050.

Conflict exists among the lower federal courts with regard to the origin of damages in § 1983 actions. Whereas the Fifth Circuit in *Foreman*, denied recovery as arising from bodily injury because, "[t]he focus is on the origin of the damages," 770 F.2d at 489, that recovery would be allowed in the Seventh Circuit, where recognition of the right to "freedom from unnecessary and unjustifiable exposure to physical danger or to injury to health" is recognized as the origin of some of the damage. *White v. Rockford*, 592 F.2d 381, 387 (7th Cir. 1979).

As noted in Part I., Texas common-law allows mental anguish recovery without proof of physical injury. *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649, 650 (Tex. 1987); *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). A direct conflict necessarily exists then, when federal district courts, applying Texas law, presume that in cases such as this one involving bodily injury all damages arise from the bodily injury. As was argued by Petitioners in their original pleadings, the damages made the basis of this § 1983 action find their origin not in the physical injuries which resulted from the deprivation of their substantive constitutional rights but from the violation of their right to personal security and freedom from unnecessary and unjustifiable exposure to physical danger, which preceded their physical injuries.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and, after full briefing and oral argument, reverse the decision of the Court of Appeals and affirm the decision of the Trial Court.

Respectfully submitted,

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Attorneys for Petitioners

March 20, 1990

APPENDIX A

OCTOBER 20, 1988.

JUDGMENT

The Fourteenth Court of Appeals

CONTINENTAL CASUALTY CO., APPELLANT

NO. A14-86-00873-CV V.

G. WAYNE HALL, INDIVIDUALLY AND AS NEXT FRIEND OF APRIL LYNN HALL, MINOR; RONALD WYATT, INDIVIDUALLY AND AS NEXT FRIEND OF NICHOLE WYATT, MINOR; AND MARTIN URAND,

APPELLEES

This cause, an appeal from the judgment in favor of G. WAYNE HALL, INDIVIDUALLY AND AS NEXT FRIEND OF APRIL LYNN HALL, MINOR; RONALD WYATT, INDIVIDUALLY AND AS NEXT FRIEND OF NICHOLE WYATT MINOR; AND MARTIN URAND signed August 22, 1986, came on to be heard on the transcript of the record.

We have inspected the record and find Continental Casualty was entitled to judgment as a matter of law. We therefore order the judgment of the court below reversed and render judgment that. WAYNE HALL, INDIVIDUALLY AND AS NEXT FRIEND OF APRIL LYNN HALL MINOR; RONALD WYATT, INDIVIDUALLY AND AS NEXT FRIEND OF NICHOLE WYATT, MINOR; AND MARTIN URAND take nothing.

We order appellees, G. WAYNE HALL, INDIVIDUALLY AND AS NEXT FRIEND OF APRIL LYNN HALL, MINOR; RONALD WYATT, INDIVIDUALLY AND AS NEXT FRIEND OF NICHOLE WYATT, MINOR, AND MARTIN URAND, to pay all costs incurred because of this appeal.

We order this decision certified below for observance.

Reversed and Rendered and Opinion Issued October 20, 1988.

In The
Fourteenth Court of Appeals

NO. A14-86-00873-CV
NO. A14-86-00688-CV

CONTINENTAL CASUALTY CO., Appellant

V.

G. WAYNE HALL, INDIVIDUALLY AND AS NEXT FRIEND OF APRIL LYNN HALL, MINOR; RONALD WYATT, INDIVIDUALLY AND AS NEXT FRIEND OF NICHOLE WYATT MINOR; AND MARTIN URAND, Appellees

AND

CONTINENTAL CASUALTY CO., Appellant

V.

KATY INDEPENDENT SCHOOL DISTRICT, Appellee

= =

On Appeal from the 240th District Court
Fort Bend County, Texas

Trial Court Cause No. 50,515 and 50,515-A

==========

O P I N I O N

This case arises from injuries sustained by children during a school sponsored tug-of-war, and appellant Continental Casualty Company's [hereinafter Continental) assertion that the Board of Education Liability [hereinafter BEL] policy it carried for the Katy Independent School District [hereinafter KISD] specifically excluded coverage for such injuries. We reverse the judgments of the trial court, and render judgment in favor of Continental.

In February of 1981, KISD students April Hall and Nichole Wyatt were participating in tug-of-war while at school. During the exercise, a knot tightened around the children's hands. Before the girls could extricate themselves, Hall had lost three fingers and Wyatt had had the skin and fingernails pulled from her fingers. In July of 1984, Hall and Wyatt filed suit in federal court against KISD, and ten employees, among whom was Martin Urand, the teacher supervising the tug-of-war. The federal action alleged the children had suffered damages as a result of the infringement of their constitutionally protected interests and rights to a safe educational environment, from risk to their bodily integrity.

Following notice of the suit, Continental informed KISD that its BEL policy, provision IV (b) (3), specifically excluded coverage:

"(b) The Insurer shall Not be liable to make any payment for loss in connection with any claim against the Assureds.

...

(3) *for damages, direct or consequential, arising from bodily injury, sickness, or death of any person,* or for damage to or destruction of any tangible property including loss or use thereof." [Emphasis added]

Continental suggested KISD contact its general liability carrier. After a protracted exchange of letters with KISD, Continental itself contacted KISD'S general liability carrier, Fidelity Casualty. Fidelity answered the federal action, and filed a motion for summary judgment demonstrating that a single instance of negligence did not, as a matter of law, rise to the level of infringement of constitutional rights. Hall and Wyatt did not respond to the motion for summary judgment.

While the federal action was still pending, Hall and Wyatt filed suit in the district court of Fort Bend County against only Martin Urand. Urand shortly thereafter signed stipulations of liability. The trial court entered a consent judgment, awarding Mall and Wyatt 10.9 million damages; approved a covenant not to execute judgment in which Urand assigned all his rights against Continental to Hall and Wyatt; and issued a protective order sealing the file. Neither KISD, Fidelity Casualty, the general liability carrier, nor Continental received notice of these state court proceedings.

After the consent judgment in the state court had become final, Mall and Wyatt agreed to dismissal of the federal court action with prejudice as to some defendants, but without prejudice as to Urand and KISD. They then demanded payment from

Continental on the consent judgment and, subsequently, filed the instant suit in the same, state district court against Continental and KISD. KISD cross-claimed against Continental on the basis of the BEL policy.

The trial court granted a motion for partial summary judgment in favor of the appellees Hall, Wyatt and Urand on the question of Continental's obligation to provide coverage under the BEL policy. The trial court ruled that, as a matter of law, the BEL policy covered appellees' claim and that Continental was liable for the face amount of the consent judgment. The trial court simultaneously overruled Continental's motion for summary judgment, which asserted that the policy unambiguously excluded coverage for these claims,

KISD filed a motion for summary judgment. KISD asserted that the trial court's ruling on the earlier motion for partial summary judgment was dispositive as to its cross-claim to recover attorney's fees" and the costs of defending both the federal and state court actions. The trial court granted KISD'S motion, holding Continental liable for attorney's fees and costs, and ordered Hall and Wyatt take nothing from KISD.

Only the issues concerning the DTPA and insurance code violations were submitted to the jury. The trial court rendered judgment for appellees for damages in excess of $22.5 million.

The seminal issue before this court is whether the trial court was correct in ruling that the BEL policy provided coverage for these claims. We find it was not.

Under even a narrow construction of the exclusion

clause, the policy unambiguously excludes claims arising from bodily injury. In determining the applicability of the exclusion, our focus must be on the origin of the damages, not the legal theory asserted for recovery. *Continental Casualty Co. v. McAllen Independent School District,* 850 F.2d 1044, 1046-47 (5th Cir. 1988); *Continental Casualty Co. v. City of Richmond,* 763 F.2d 1076, 1080-81 9th Cir. 1985). Hall and Wyatt seek damages arising from the physical injuries to their hands, unquestionably bodily injury. The BEL policy excludes such claims from coverage. *See Continental Casualty v. McAllen,* 50 P.2d at 1046-47, and Foreman v. Continental Casualty, 770 F.2d 487, 489 (5th Cir. 1985) (construing identical exclusion clauses).

Accordingly, the trial court erred in granting the partial summary judgment in favor of Hall, Wyatt and Urand, and the summary judgment in favor of KISD. Since the policy, as it matter of law, excludes appellees' claims, the trial court erred by failing to grant summary judgment in favor of Continental. Continental's points of error one, two, eleven, one hundred fourteen, and one hundred fifteen are sustained.

Due to the disposition of these points, it is unnecessary to reach Continental's remaining points of error.

The judgments of the trial court are reversed, and judgments entered for Continental.

/s/Paul C. Murphy
Justice

Judgment entered and opinion issued October 20, 1988.

Panel consists of Chief Justice Brown and Justice Murphy, and Robertson.

Publish - TEX.R.App.P. 90.

APPENDIX B

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

November 23, 1988

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RE: CASE NO. 14-86-00688-CV TRIAL COURT CASE NO. 50,515-A

STYLE: Continental Insurance Company
V: Katy Independent School District

Counsel:

Please be advised that, on this date, the Court OVERRULED appellee's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Friday, December 23, 1988.

Respectfully yours,

MARY JANE SMART, CLERK

By /s/ Charlene Mitchell
Deputy

Hon. Richard A. Simpson
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APPENDIX C

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November 8, 1989

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THE LAW FIRM OF: ROSS, DIXON, MASBACK
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Columbia Square, Suite #1300 East
Washington DC 20004

RE: Case No. C-8269

STYLE: G. WAYNE HALL, INDIVIDUALLY and a/n/f OF APRIL LYNN HALL,
v. CNA AND CONTINENTAL CASUALTY COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, Writ Denied.

Respectfully yours,

John T. Adams, Clerk

By /s/ Courtland Crocker
Deputy

APPENDIX D

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Austin, Texas 78711
John T. Adams, Clerk

December 20, 1989

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RE: Case No. C-8269

STYLE: G. WAYNE HALL, INDIVIDUALLY and a/n/f OF APRIL LYNN HALL,
v. CNA AND CONTINENTAL CASUALTY COMPANY

Dear, Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By /s/ Courtland Crocker
Deputy

No. 89-1536

FILED

APR 19 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

G. WAYNE HALL, Individually And As Next Friend Of APRIL LYNN HALL, MINOR; RONALD WYATT, Individually And As Next Friend Of NICOLE WYATT, MINOR; MARTIN URAND; and KATY INDEPENDENT SCHOOL DISTRICT,

Petitioners,

v.

CNA INSURANCE COMPANIES and CONTINENTAL CASUALTY CO.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENTS' REQUEST PURSUANT TO RULE 42.2 FOR SANCTIONS

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QUESTIONS PRESENTED

1. Whether as a matter of Texas state law the bodily injury exclusion of a Board of Education liability insurance policy bars coverage for a judgment entered against a school teacher in an action brought pursuant to 42 U.S.C. § 1983 by students who suffered physical injuries in a tug-of-war accident?

2. Whether sanctions should be imposed on Petitioners and/or their counsel for filing a misleading and frivolous petition?

LIST OF PARTIES

The parties to the proceedings in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston are correctly identified in the caption of this Opposition, except that there is no legal entity known as "CNA Insurance Companies." Rather, "CNA Insurance Companies" is a fleet name for a group of insurance companies, including Respondent Continental Casualty Company. The parent company of Continental is CNA Financial Corporation, which in turn is owned in part by Loews Corporation. Healthco, Inc. is a non-wholly owned subsidiary of Continental.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATEMENT OF THE CASE	2
A. Underlying Facts	2
1. The Accident	2
2. The Federal Action	2
3. The Collusive State Action and Urand's False Stipulation	3
(a) The State Action Against Urand	3
(b) The Consent Judgment	4
B. Proceedings in the Trial Court	4
C. Proceedings on Appeals	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE PETITION IS FRIVOLOUS	7
II. REQUEST FOR SANCTIONS	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Continental Casualty Co. v. McAllen Independent School District, 850 F.2d 1044 (5th Cir. 1988) .. 8-9
Continental Casualty Co. v. City of Richmond, 763 F.2d 1076 (9th Cir. 1985) 7-9
Continental Casualty Co. v. Hall, 761 S.W.2d 54 (Tex. Ct. App. 1988, *writ denied*) ..... *passim*
Cotton States Mutual Insurance Co. v. Crosby, 244 Ga. 456, 260 S.E.2d 860 (1979) 8
Foreman v. Continental Casualty Co., 770 F.2d 487 (5th Cir. 1985) 8-9
Gilmere v. City of Atlanta, 864 F.2d 734 (11th Cir.), *cert. denied*, 110 S. Ct. 70 (1989) 8-9
Interstate Fire & Casualty Co. v. Stuntman, Inc., 861 F.2d 203 (9th Cir. 1988) 8
McKinney v. Greene, 379 So. 2d 69 (La. Ct. App. 1979), *writ denied*, 381 So. 2d 1233 (La. 1980) .. 8
Town of Brattleboro v. Travelers Insurance Co., 141 Vt. 402, 449 A.2d 945 (1982) 8
White v. Rochford, 592 F.2d 381 (7th Cir. 1979) .. 9

STATUTES

28 U.S.C. § 1257(3) 1
28 U.S.C. § 1257(a) 1
42 U.S.C. § 1983 ..... *passim*

RULES

Sup. Ct. R. 42.2 ..... 6, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1536

G. WAYNE HALL, Individually And As Next Friend Of APRIL LYNN HALL, MINOR; RONALD WYATT, Individually And As Next Friend Of NICOLE WYATT, MINOR; MARTIN URAND; and KATY INDEPENDENT SCHOOL DISTRICT,

Petitioners,

v.

CNA INSURANCE COMPANIES and CONTINENTAL CASUALTY CO.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENTS' REQUEST PURSUANT TO RULE 42.2 FOR SANCTIONS

JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3), which has been repealed. This Court lacks jurisdiction under 28 U.S.C. § 1257(a), which replaced the repealed provision cited by Petitioners, because no federal question is presented.

STATEMENT OF THE CASE

A. Underlying Facts

1. The Accident

This case arises from an accident on February 5, 1981, during a tug-of-war event at an elementary school in which Petitioner April Hall lost three fingers on her left hand, and Petitioner Nicole Wyatt lost skin from her fingers and some fingernails. Petitioner Martin Urand was one of the three teachers who supervised the tug-of-war. D Ex-BE 1.[1]

2. The Federal Action

On July 19, 1984, Hall and Wyatt sued Petitioner Katy Independent School District ("KISD"), Urand and ten other individuals alleging violations of their constitutional rights in connection with the tug-of-war accident. *G. Wayne Hall a/n/f April Hall, et al. v. Katy Independent School District, et al.*, C.A. No. H-84-3042 (S.D. Tex.) (the "Federal Action"). D Ex-BE 1; D Ex-BE 24.

After receiving notice of this suit, Respondent Continental Casualty Company[2] ("CNA") advised KISD that the Board of Education Liability ("BEL") insurance policy that it issued to KISD bars coverage for claims for damages arising from bodily injury. Specifically, the BEL Policy precludes coverage for any claims for:

---

[1] Citations to the record in this brief are in the following form: "SF" refers to the Statement of Facts; "SF-BE" refers to Bill of Exceptions portions of the Statement of Facts; "Pl. Ex" refers to plaintiffs' trial exhibits; "D Ex" refers to Respondent's trial exhibits; "D Ex-BE" refers to Respondent's Bill of Exceptions exhibits; and "TR" refers to the Transcript.

[2] The trial court also entered judgment against "CNA Insurance Companies," although there is no such legal entity. "CNA Insurance Companies" is a fleet name for a group of insurance companies, including Continental Casualty Company.

> any damages, direct or consequential, arising from bodily injury, sickness, disease, or death of any person.

Pl. Ex. 46 A. CNA suggested that KISD contact its comprehensive general liability carrier, Fidelity & Casualty Company, whose policy covers claims for bodily injury. SF Vol. XIV 2629-30, D Ex-BE 1.

Fidelity & Casualty thereafter provided a defense, subject to a reservation of rights, for KISD and the individual defendants in the Federal Action through the Houston law firm of Vinson & Elkins. SF-BE Vol. XIV-A 2645, 2666-67, 2670; D Ex-BE 4, 5. On August 5, 1985, Vinson & Elkins filed a motion for summary judgment in the Federal Action, demonstrating conclusively that an isolated case of negligence cannot as a matter of settled law be raised to the level of a constitutional violation. D Ex-BE 8, 23. Rather than respond on the merits to this motion, Hall and Wyatt consented to an order dismissing the Federal Action with prejudice as to two defendants, and without prejudice as to KISD, Urand and the other defendants. The Federal Action was dismissed accordingly. D Ex-BE 28.

3. The Collusive State Action And Urand's False Stipulation

(a) *The State Action Against Urand*

On June 13, 1985, Hall and Wyatt filed a new suit in the 240th Judicial District of Texas against only Urand, alleging the same kinds of purported constitutional violations asserted in the pending Federal Action. *G. Wayne Hall a/n/f April Hall and Ronald Wyatt a/n/f Nicole Wyatt v. Martin Urand*, Cause No. 50,471 (the "State Action"). D Ex-BE 19. Without being served with the complaint, Urand immediately agreed to certain Stipulations and Agreements (the "Stipulation") in which he falsely confessed to liability. D Ex-BE 17. Hall, Wyatt and Urand did not give notice of the State Action to

CNA, Fidelity & Casualty, KISD, the other parties to the Federal Action or the judge hearing the Federal Action, Honorable Carl O. Bue. SF-BE Vol. XIV-A 2653, 2679, SF-BE Vol. XIV-C 2809-10; D Ex-BE 1.

(b) *The Consent Judgment*

On Monday, June 17, 1985, two business days after the State Action was filed, Judge Charles A. Dickerson entered a judgment (the "Consent Judgment") awarding Hall $7,365,000 for the loss of three fingers and Wyatt $3,560,000 for the loss of skin from her fingers and fingernails. D Ex-BE 18. The Consent Judgment also approved a Covenant Not To Execute And Assignment by which Hall and Wyatt agreed not to execute on any of Urand's assets and not to record the Consent Judgment, and to split the proceeds of their planned suit against CNA with Urand.[3] *Id.* Judge Dickerson immediately ordered the Court's file sealed. D Ex-BE 20.

B. Proceedings In The Trial Court

After waiting 30 days for the Consent Judgment to become final, Hall, Wyatt and Urand brought the instant action in the 240th Judicial District against CNA and certain Texas citizens. On December 23, 1985, Judge Dickerson, the same judge who had approved the Consent Judgment, held on a motion for partial summary judgment that the claims purportedly asserted in the State Action were covered under the Policy, and that CNA was liable for the "face amount" of the Consent Judgment, *i.e.*, $10,925,000, notwithstanding its $1 million policy limit. TR 279. He also held that because CNA had wrongfully denied coverage it could not assert its defenses that: (i) the Consent Judgment was procured by

---

[3] Urand assigned his rights under the BEL Policy to Hall and Wyatt, except that Urand "specifically retained an equal interest with Plaintiffs, in all monies recovered pursuant to this assignment in excess of the face amount of [the Consent Judgment]." D Ex-BE 18.

fraud and collusion; (ii) the amount of the Consent Judgment was unreasonable; (iii) the Consent Judgment was not the result of an actual trial or adversary proceeding; and (iv) CNA did not receive notice of the suit in which the Consent Judgment was entered. Finally, Judge Dickerson ruled that Urand's actions in entering into the deal that led to the Consent Judgment were reasonable as a matter of law. *Id.*

Following a trial at which Judge Dickerson entered all 51 paragraphs of three extraordinary motions in limine filed by plaintiffs, thereby effectively stripping CNA of any ability to defend itself, the jury found that CNA's handling of the claim had violated the Texas Deceptive Trade Practices Act and the Texas Insurance Code. On August 22, 1986, Judge Dickerson entered final judgment against CNA in the total amount of $22,565,756, of which $5,153,908 was awarded to Urand, the gym teacher whose negligence allegedly caused the tug-of-war accident. TR 1308, 1309, 1413. On his own motion, Judge Dickerson also entered a gag order directing the parties to keep confidential all matters relating to the State Action, including the amount of the Consent Judgment. TR 1273.

In a separate case, which was consolidated on appeal, Judge Dickerson held that Petitioner KISD was entitled to coverage under the BEL policy for the attorneys' fees charged by its independent counsel in the Federal Action, Bracewell & Patterson, which assisted Vinson & Elkins in defending that case. Cause 50-515A, TR 479.

C. Proceedings On Appeal

On appeal, the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston reversed the decision below, and entered judgment for CNA. *Continental Casualty Co. v. Hall*, 761 S.W.2d 54 (Tex. Ct. App. 1988, *writ denied*). It held that the bodily injury exclusion of CNA's policy clearly bars coverage for the claims purportedly asserted by Hall and Wyatt against

Urand. The Court of Appeals also reversed the judgment in favor of KISD in the separate action on the same grounds. The Texas Supreme Court declined to review the decision of the appellate court.

Petitioners did not raise any federal question in either the trial court or on appeal, and the Texas Court of Appeals did not decide any federal question. The case was decided solely as a matter of state law interpretation of the insurance contract. *See Continental Casualty Co. v. Hall*, 761 S.W.2d at 56.[4]

SUMMARY OF ARGUMENT

Petitioners' assertion that this case presents issues concerning the proper interpretation of 42 U.S.C. § 1983 is a flat-out misrepresentation. This is purely and simply a state law insurance contract case. Petitioners never presented—and the state court never decided—any federal question. Accordingly, the petition should be denied.

Moreover, because the petition is misleading and patently frivolous, the Court should award Continental just damages in the amount of its attorneys' fees incurred in responding to the petition, plus double costs, pursuant to Rule 42.2 of the Rules of this Court.

---

[4] CNA raised several federal constitutional issues as defenses. It asserted, for example, that as a matter of due process it could not be bound by a judgment entered in a case where it had neither notice nor an opportunity to defend, and that it was entitled to assert its defense that the Consent Judgment was obtained by fraud and collusion. CNA also asserted that the trial court's conduct of the trial was so outrageously unfair as to deprive it of due process, and that the award of punitive damages against it under the circumstances of this case could not pass constitutional muster. The Court of Appeals did not reach any of the constitutional issues raised by CNA.

ARGUMENT

I. THE PETITION IS FRIVOLOUS

1. This case presents only a state law question concerning the proper interpretation of an insurance contract. Hall and Wyatt obtained (albeit by out-and-out fraud and collusion) a judgment against Urand for purported violations of their constitutional rights. Hall and Wyatt then joined Urand in bringing this action against CNA seeking recovery under the insurance policy for the damages awarded against Urand in the underlying § 1983 action. The case does not raise, and the Texas Court of Appeals did not consider, any issue concerning what kinds of damages may be recovered by a plaintiff in a § 1983 action. It decided only that under Texas law the BEL policy does not provide coverage for a defendant in a § 1983 case where the underlying injury is a bodily injury. *Continental Casualty Co. v. Hall*, 761 S.W.2d 54.

This holding is in accord with every other decision on point. In *Continental v. City of Richmond*, 763 F.2d 1076 (9th Cir. 1985), for example, a municipality demanded coverage under a public officials liability policy for a § 1983 lawsuit filed against it by the children of a man who was allegedly beaten to death in a city jail. The Court of Appeals for the Ninth Circuit held that the policy's bodily injury exclusion, which was identical to that at issue here, precluded coverage. The Court explained:

> In summary, it is clear to us that the injuries suffered by [the decedent] are of the category specifically excluded from coverage by the CNA policy. It is equally obvious that when the term "arising from" is interpreted in the light of existing precedent and the express policy language, the heirs' claims indisputably "arise from" the injuries incurred by [the decedent]. Thus, the CNA policy provides no coverage for the heirs' claims.

Id. at 1081. All other decisions on point have reached the same conclusion. *Continental Casualty Co. v. McAllen Indep. School Dist.*, 850 F.2d 1044 (5th Cir. 1988) (under CNA BEL policy, school was not entitled to coverage for constitutional claims asserted by student who suffered burns when he placed potassium in his pocket); *Foreman v. Continental Casualty Co.*, 770 F.2d 487 (5th Cir. 1985) (under CNA BEL policy, school board was not entitled to indemnification for sums paid in connection with suit against school officials for damages resulting from physical assault and sexual molestation); *see also Cotton States Mut. Ins. Co. v. Crosby*, 244 Ga. 456, 260 S.E.2d 860 (1979); *McKinney v. Greene*, 379 So. 2d 69 (La. Ct. App. 1979), *writ denied*, 381 So. 2d 1233 (La. 1980); *Town of Brattleboro v. Travelers Ins. Co.*, 141 Vt. 402, 449 A.2d 945 (1982).[5]

2. Petitioners suggest that *City of Richmond*, *Foreman* and their progeny determined rights under § 1983 (Pet. at 8), and are somehow at odds with the holding of the Court of Appeals for the Eleventh Circuit in *Gilmere v. City of Atlanta*, 864 F.2d 734 (11th Cir.), *cert. denied*, 110 S. Ct. 70 (1989). But *City of Richmond* and *Foreman* dealt only with the question of what insurance coverage is available under applicable state law to § 1983 *defendants*. *Foreman v. Continental Casualty Co.*, 770 F.2d at 489 (applying Mississippi law); *Continental Casualty Co. v. City of Richmond*, 763 F.2d at 1079-81 (applying California law); *see also Continental Casualty*

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[5] The decision of the Ninth Circuit in *Interstate Fire & Casualty Co. v. Stuntman, Inc.*, 861 F.2d 203 (1988), is not on point. As Petitioners concede, *Stuntman* did not involve questions of coverage for constitutional claims. (See Pet. at p. 10). Moreover, the policy provisions are distinguishable. Unlike the broad exclusionary language in CNA's BEL policy, the policy in *Stuntman* provided, under the coverage section, for payment of damages, direct or consequential, because of liability for *bodily injury, shock, sickness or disease*, but, under the exclusion, only stated that the policy did not apply to *bodily injury for performers*. *See id.* at 204.

Co. v. McAllen Indep. School Dist., 850 F.2d at 1046 (applying Texas law). In contrast, *Gilmere* was a § 1983 suit in which the district court awarded $20,000 in compensatory damages based on the decedent's actual injuries, but declined to award additional damages for violations of the decedent's Fourth Amendment rights and assault and battery because to have done so would have resulted in double recovery for the same injuries. 864 F.2d at 740-41.

Thus, unlike *City of Richmond*, *Foreman*, *McAllen* and this case, *Gilmere* adjudicated a § 1983 claim. Whether the holding in *Gilmere* conflicts with decisions in other § 1983 suits is irrelevant to this insurance coverage action.

3. Next, Petitioners falsely allege (Pet. at 13) that *Foreman* and *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) reflect a split among lower federal courts with regard to the origin of damages in § 1983 cases. *Foreman* denied a school board recovery under an insurance policy because "the [bodily injury] exclusion focuses on the kind of injury, not on the type of wrongful act." 770 F.2d at 489. The question in *White*, on the other hand, was whether a § 1983 plaintiff who had suffered non-physical injuries had stated a valid cause of action. Thus, *Foreman* is purely and simply a state-law insurance case, and decided an entirely different question than did *White*.

II. REQUEST FOR SANCTIONS

Rule 42.2 of the Rules of this Court expressly provides that "[w]hen a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs." This case presents a classic example of the abuse that Rule 42.2 is intended to prevent. Petitioners seek review by this Court of a case that does not present any federal question, and in which they did not even purport to raise any federal question below. It

is difficult to imagine how a petition could be more frivolous. Moreover, as explained above, the petition is clearly misleading in suggesting that this is a § 1983 case, not an insurance contract case.

Under these circumstances, sanctions are appropriate both to compensate CNA for its expenses in responding to the frivolous petition, and to deter others from burdening the Court with similarly meritless and misleading petitions. Accordingly, CNA requests that the Court award it damages in the amount of its attorneys' fees incurred in responding to the petition, plus double costs.

CONCLUSION

The petition for a writ of certiorari should be denied, and sanctions should be imposed on Petitioners and/or their counsel.

Respectfully submitted,

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